Supreme Court, U.S.
FILED

97 1227 JAN 26 1998

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No. _____

In The

Supreme Court of the United States

October Term, 1997

JOSE LUIS MAGALLON AND GERARDO DELGADO-GARIBAY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether an appellate court may review and reverse a defendant's sentence under a plain error standard, where the district court relies on the wrong guideline in calculating the defendant's base offense level, resulting in the defendant being sentenced to twice the number of years called for under the correct guideline, but where the defendant failed to object at the time of sentencing?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the United States of America, Jose Luis Magallon and Gerardo Delgado-Garibay. In the lower court there were two co-defendants: Robert Gonzales and Luis E. Estrada-Hernandez.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The first decision of the Court of Appeals dated May 5, 1997 is reported at 113 F.3d 150 (9th Cir. 1997) and attached as Appendix A. The order dated June 5, 1997 withdrawing the first decision of the Court of Appeals is reported at 115 F.3d 675 (9th Cir. 1997) and is attached as Appendix B. The second decision of the Court of Appeals, dated September 15, 1997, is unreported and is attached as Appendix C. The order dated October 31, 1997 denying a petition for rehearing *en banc* is unreported and is attached as Appendix D. The judgments and sentences of the District Court dated October 10, 1995 and December 13, 1995, are attached as Appendix E.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. section 1254 and Rule 13 of the Rules of the Supreme Court.

STATUTORY PROVISIONS

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

Rule 32 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (b)(4) **Contents of the Presentence Report.** The presentence report must contain –
>
> (A) information about the defendant's history and characteristics . . .
>
> (B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case . . .
>
> . . . .
>
> (b)(6)(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. . . .
>
> . . . .
>
> (b)(6)(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

SENTENCING GUIDELINES PROVISIONS

United States Sentencing Guidelines, Section 2D1.1. provides in relevant part:

DRUG QUANTITY TABLE

Controlled Substance and Quantity	*Base Offense Level*
. . . .	
(3) At least 30kg but less than 100kg of methamphetamine	Level 38
. . . .	
(6) At least 1,000kg but less than 3,000kg of marijuana	Level 32

DRUG EQUIVALENCY TABLES

Schedule I or II Opiates

1gm of L-Methamphetamine/Levo-Methamphetamine/ L-Desoyephedrine = 40 grams of marijuana

. . . .

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category I
. . . .	
32	121-151 (months)
. . . .	
38	235-293 (months)
. . . .	

STATEMENT OF THE FACTS

Petitioner Jose Luis Magallon was convicted after a jury trial of one count of conspiracy to manufacture and distribute methamphetamine. 21 U.S.C. § 846. Petitioner Gerardo Delgado-Garibay was convicted of one count of

conspiracy to manufacture and distribute methamphetamine, 21 U.S.C. § 846, and one count of manufacturing methamphetamine. 21 U.S.C. § 841(a)(1).

In December of 1993 the petitioners, Magallon and Delgado-Garibay, were involved in the operation of a clandestine methamphetamine laboratory located on a remote section of the Vincent ranch in Porterville, California. A government informant, Cesar Romero, accompanied Delgado-Garibay to the laboratory site where workers produced approximately 100 pounds of methamphetamine over a period of three days of "cooking" the chemicals.

Cesar Romero relayed information concerning the December manufacture of methamphetamine to State and Federal narcotics officers. In late January of 1994, a search warrant was served on the Vincent ranch and the laboratory site was located. The narcotics officers found large quantities of chemicals and laboratory equipment used in the process of manufacturing methamphetamine. Because the 100 pounds of methamphetamine had been removed from the site by the conspirators in December of 1993, it was not recovered by the officers during their search of the lab site in January of 1994. Indeed, government agents never seized or tested any of the 100 pounds of methamphetamine that were manufactured in December of 1993 at the Vincent ranch. Thus, the government's case against the petitioners was what is sometimes referred to as a "no dope" conspiracy. See, *United States v. Dudden*, 65 F.3d 1461, 1470 (9th Cir. 1995).

At the time of sentencing, the district court determined that the quantity of methamphetamine involved in

the case, for sentencing purposes under the Sentencing Guidelines, was 100 pounds of methamphetamine, the amount manufactured in December 1993 at the Vincent ranch. The district court converted 100 pounds to 45.36 kilograms of methamphetamine and then using the Drug Quantity Table found in Guidelines Section 2D1.1, determined that the base offense level was Level 38. U.S.S.G. § 2D1.1.

The sentencing range for a base offense level of 38 is 235 months to 293 months. Petitioner Magallon was sentenced to 235 months. Petitioner Delgado-Garibay had his base offense level increased four levels for his aggravated role in the offense, U.S.S.G. § 3B1.1, resulting in a final offense level of 42, which has a sentencing range of 360 months to life. Delgado-Garibay was sentenced to life in prison without possibility of parole.

No objection was made by either petitioner at the time of sentencing that they were being sentenced under the wrong Sentencing Guidelines for D-methamphetamine and that the correct Sentencing Guidelines were those for L-methamphetamine. The government had presented no evidence either at trial or at sentencing as to which type of methamphetamine was involved. Since the government agents had never seized the 100 pounds of methamphetamine, it was physically impossible for government chemists to conduct any test in order to prove that the drugs were D-methamphetamine rather than L-methamphetamine.

The base offense level for 100 pounds of L-methamphetamine under the Sentencing Guidelines is computed by reference to the Drug Equivalency Tables of

Guidelines Section 2D1.1. The table provides that one gram of L-methamphetamine is the equivalent of 40 grams of marijuana. In this case, 100 pounds of L-methamphetamine is the same as 45,360 grams, which under the Drug Equivalency Table is the equivalent of 1714 kilograms of marijuana, and calls for a base offense level of 32, U.S.S.G. § 2D1.1.

Thus, using the Sentencing Guidelines for L-methamphetamine, the petitioners' base offense level would have been level 32, having a sentencing range of 121 months to 151 months. Using the Sentencing Guidelines for L-methamphetamine could have resulted in Petitioner Magallon receiving a sentence of 121 months, rather than a sentence of 235 months. In Petitioner Delgado-Garibay's case, his final offense level using the Sentencing Guidelines for L-methamphetamine would have been level 36, which has a sentencing range of 188 months to 235 months. Petitioner Delgado-Garibay could have received a sentence of 188 months under the L-methamphetamine Guidelines rather than a life sentence under the D-methamphetamine Guidelines. Each petitioner therefore suffered clear prejudice as a result of being sentenced under the wrong Sentencing Guideline.

On direct appeal to the United States Court of Appeal for the Ninth Circuit, the petitioners argued that they were erroneously sentenced to an offense level 38 under the Guidelines. Petitioners argued that it was plain error to sentence them under the higher Guidelines for D-methamphetamine without some proof in the record that the drug was D-methamphetamine rather than L-methamphetamine, which carries a base offense level of 32.

The original Ninth Circuit opinion in this case did find plain error in petitioners' sentences. The Court vacated the sentences and remanded for a resentencing to determine whether the government had evidence that the drug was D-methamphetamine. *United States v. Magallon*, 113 F.3d 150 (9th Cir. 1997). The Court stated: "[C]onsidering the magnitude of the difference in sentencing that could result from the application of the wrong organic isomer, we think the sentencing court's failure to make this determination would result in a grave miscarriage of justice." *United States v. Magallon, supra*, at 152, citing *United States v. Boqusz*, 43 F.3d 82, 90 (3rd Cir. 1994); *United States v. Ramsdale*, 61 F.3d 825, 832 (11th Cir. 1995). Of critical importance in reaching this conclusion was the fact that "the government bears the burden at sentencing of proving by a preponderance of the evidence the type of methamphetamine involved in a drug offense." *United States v. Magallon, supra*, at 152-153; accord *United States v. Dudden*, 65 F.3d 1461, 1470 (9th Cir. 1995); *United States v. Ramsdale, supra* at 831; *United States v. Patrick*, 983 F.2d 206, 208 (11th Cir. 1993).

On June 5, 1997 the Ninth Circuit on its own motion vacated the decision in *Magallon* pending the decision in *United States v. Scrivner*, No. 95-30227. On June 10, 1997 another panel of the Ninth Circuit Court of Appeals reached the opposite conclusion from that which was reached in the first *Magallon* decision. *United States v. Scrivner*, 114 F.3d 964 (9th Cir. 1997). The *Scrivner* case held that it is not plain error to sentence a defendant for D-methamphetamine, even where there is no evidence in the record concerning the type of methamphetamine in the case, if the defendant fails to object at the time of

sentencing. The Court in *Scrivner* rejected the approach of the Third and Eleventh Circuits in *United States v. Boqusz*, 43 F.3d 82 (3rd Cir. 1994) and *United States v. Ramsdale*, 61 F.2d 825 (11th Cir. 1995), choosing instead to adopt the contrary approach of the Tenth Circuit in *United States v. Deninno*, 29 F.3d 572 (10th Cir. 1994). "[W]e join the Tenth Circuit in holding that, where defendants do not object at trial or sentencing about the type of methamphetamine involved in their case, it is not plain error for the district court to sentence those defendants based on their involvement with the more common methamphetamine, without making a finding to classify the methamphetamine as D-meth, as opposed to L-meth." *United States v. Scrivner*, 114 F.3d 964, 970 (9th Cir. 1997).

After the *Scrivner* case was decided, the three judge panel in petitioners' case redecided the *Magallon* case and affirmed the sentences, finding no plain error. *United States v. Magallon*, No. 95-10438 (unpublished memorandum). The panel relied on *United States v. Scrivner*, 114 F.3d 964 (9th Cir. 1997). A petition for rehearing *en banc* was filed by petitioners, but was denied by the Ninth Circuit Court on October 31, 1997.

REASONS FOR GRANTING THE WRIT

I.

AN APPELLATE COURT MAY REVIEW A DEFENDANT'S SENTENCE UNDER A PLAIN ERROR STANDARD AND REVERSE THE SENTENCE, WHERE THE DISTRICT COURT ERRONEOUSLY RELIED ON THE WRONG GUIDELINE IN CALCULATING THE DEFENDANT'S BASE OFFENSE LEVEL, AND THE DEFENDANT FAILED TO OBJECT AT THE TIME OF SENTENCING.

This case raises an important question concerning the standard of review of sentencing errors committed by a district court when imposing a sentence in a criminal case under the United States Sentencing Guidelines. The Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 et seq., 28 U.S.C. §§ 991-998, created the United States Sentencing Commission and empowered it to promulgate guidelines establishing sentencing ranges for different categories of federal offenses and defendants.

The petitioners, Jose Luis Magallon and Gerardo Delgado-Garibay, claim that the district court committed plain error in sentencing them for a drug crime involving methamphetamine, when the district court sentenced them under the Sentencing Guidelines for D-methamphetamine rather than L-methamphetamine. The Sentencing Guidelines call for a higher sentence in cases involving D-methamphetamine and the sentence is almost double the sentence required in cases involving a comparable amount of L-methamphetamine. The government presented no evidence either at trial or at sentencing as to which type of methamphetamine was involved in this case. The petitioners, however, failed to raise an

objection at the time of sentencing, but claim that the error may be corrected on appeal under a plain error standard of review.

At the present time there is split of authority in the Circuits concerning the legal issue raised in this case. The Eighth, Ninth and Tenth Circuits have held that a district court does not commit plain error in sentencing a defendant for a drug crime involving D-methamphetamine when the government fails to introduce any evidence as to the type of methamphetamine involved. See, *United States v. Scrivner*, 114 F.3d 964, 970 (9th Cir. 1997); *United States v. Griggs*, 71 F.3d 276, 282 (8th Cir. 1995); *United States v. Deninno*, 29 F.3d 572, 580 (10th Cir. 1994). In contrast, the Third and Eleventh Circuits have held that it is plain error to sentence a defendant for D-methamphetamine without any evidence presented as to the type of methamphetamine that is involved. See, *United States v. Ramsdale*, 61 F.3d 825, 832 (11th Cir. 1995); *United States v. Boqusz*, 43 F.3d 82, 90 (3rd Cir. 1994).

The Ninth Circuit has only recently joined the Eighth and Tenth Circuits in finding that it is not plain error. *United States v. Scrivner*, 114 F.3d 964 (9th Cir. 1997). For a brief period of time, the Ninth Circuit joined the Third and Eleventh Circuits and found that it was plain error in the petitioners' case. *United States v. Magallon*, 113 F.3d 150 (9th Cir. 1997). This first *Magallon* opinion was later withdrawn from publication. *United States v. Magallon*, 115 F.3d 695 (9th Cir. 1997). In a subsequent unpublished memorandum, the original ruling in the *Magallon* case was reversed in light of *Scrivner*. The Court found no plain error and affirmed petitioners' sentences. *United*

States v. Magallon, No. 95-10438 (unpublished memorandum). Because of the split of authority among the Circuits, the petitioners urge the Court to grant certiorari.

A. The Plain Error Standard

Plain error is the standard of review under which an appellate court may correct an error not raised at trial. *United States v. Olano*, 507 U.S. 725, 732 (1993). "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." Fed. R. Cr. Proc., Rule 52(b). Before an appellate court may reverse under a plain error standard, there must be (1) error, (2) that is plain, and (3) that affects substantial rights and (4) the error must be one that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Johnson v. United States*, 117 S.Ct. 1544, 1549 (1997).

The plain error standard distinguishes between forfeiture, which is the failure to make a timely assertion of a right, and waiver, which is the intentional relinquishment of a known right. There is no error if a defendant intentionally waives a known right. However, the plain error doctrine does apply to forfeited rights, where a district court violates a legal rule and the defendant did not waive the rule. "[T]hen there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *United States v. Olano*, 507 U.S. 725, 732 (1993). Thus, an error in a district court's selection of the Sentencing Guideline applicable to a defendant's crime would be the type of legal error that is subject to the plain error standard, despite the absence of a timely objection.

The Sentencing Guidelines provide a specific methodology for setting the penalty for the commission of a specific crime. *Koon v. United States*, 116 S.Ct. 2035, 2044 (1996). The district court locates the crime in the statutory index of the *Guidelines Manual* and is directed to the applicable Guidelines Section to be used in computing the sentence. *Guidelines Manual* (Appendix A – Statutory Index). The Guidelines Section then directs the court to the applicable offense level and sentencing range. *Guidelines Manual* (Sentencing Table); *United States v. Smertneck*, 952 F.2d 264, 265 (5th Cir. 1992).

"A defendant may file an appeal if a sentence is imposed in violation of the Guidelines." *Williams v. United States*, 503 U.S. 193, 198-199 (1992); 18 U.S.C. § 3742(a). Section 4742(f) provides that if the court of appeals determines that the sentence "was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." *Williams v. United States, supra* at 199.

B. D-Methamphetamine vs. L-Methamphetamine

The drug methamphetamine exists in two isomeric forms. *United States v. Dudden*, 65 F.3d 1461, 1470 (9th Cir. 1995). L-methamphetamine produces little or no effect when ingested, whereas D-methamphetamine produces an intense high. *United States v. McMullen*, 98 F.3d 1155, 1156 (9th Cir. 1996). At the time the defendants were sentenced, the Sentencing Guidelines (through the Drug

Equivalency Tables) imposed substantially lower sentences for crimes involving L-methamphetamine than crimes involving D-methamphetamine. See *United States v. Boqusz*, 43 F.3d 82, 89 (3rd Cir. 1994); U.S.S.G. § 2D1.1, comment. (n.10) (Drug Equivalency Tables) (Nov. 1990)[1]

At the time of sentencing in the present case, the government had in its possession small traces of methamphetamine obtained from objects seized from some of the conspirators. It did not, however, present any evidence at trial or during sentencing that the 100 pounds of methamphetamine manufactured in December of 1993 at the Vincent Ranch was D rather than L-methamphetamine.

The probation officer who prepared the presentence reports referred to the drug simply as "methamphetamine," but assumed it was D-methamphetamine in calculating the recommended base offense levels under the Guidelines. None of the defendants objected at sentencing to the base offense levels recommended in the presentence reports or to the government's failure to produce any evidence that the drug involved was D-methamphetamine. The district court used the base offense levels for D-methamphetamine in calculating petitioner's sentences.

Because the sentences for D-methamphetamine are longer than the sentences for L-methamphetamine, the

---

[1] The Guidelines have subsequently been amended to eliminate any distinction in sentencing between L-methamphetamine and D-methamphetamine. *United States v. McMullen*, 98 F.3d 1155, 1156 (9th Cir. 1996); U.S.S.G. § 2D1.1 (Nov. 1, 1995).

government bears the burden at sentencing of proving by a preponderance of the evidence that the drug was D-methamphetamine if the defendant is to be sentenced to the longer of the two sentencing ranges. This Court has noted that placing the burden of proving a sentencing enhancement on the government by a "preponderance standard satisfies due process." *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986). Where the government at sentencing presents no evidence that the drug was D-methamphetamine, there is a failure of proof on that issue, and the district court must sentence a defendant to the lesser penalty for L-methamphetamine. *United States v. Dudden*, 65 F.3d 1461, 1471 (9th Cir. 1995); *United States v. Patrick*, 983 F.2d 206, 208 (11th Cir. 1993). A defendant who fails to object at the time of sentencing has not waived the issue. He has merely forfeited the right at sentencing and may seek to correct the error on appeal under the plain error standard.

In this case all four elements of plain error exist. Imposing a 20 year sentence for D-methamphetamine, when the law requires a 10 year sentence for L-methamphetamine, is error, because it is a misapplication of the Sentencing Guidelines. It is plain if the error can be detected by simply reading the Sentencing Guidelines Manual, which is the case here. It affects substantial rights of the petitioners, if they are forced to serve double the sentence that is actually called for under the Guidelines for their crimes. Finally, the error of sentencing a person to prison for 20 years rather than 10 years based upon a mistaken application of the wrong Guideline section, is the type of error that seriously affects the fairness, integrity and public reputation of judicial proceedings. It

is grossly unfair for petitioners to serve sentences of life and 235 months because the sentencing judge misread the Sentencing Guideline Manual and chose the wrong sentence by mistake, thereby doubling the sentences for their crimes. Correcting such a mistake would increase the public reputation of the judicial proceedings by letting it be known that no person shall be imprisoned except upon proof that the sentence imposed is, in fact, the sentence required by law. See, *Koon v. United States*, 116 S.Ct. 2035, 2053 (1996) ["The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice."].

CONCLUSION

Based upon the foregoing, petitioners urge the Court to grant this petition for writ of certiorari.

Respectfully submitted,

JOSEPH F. WALSH
Attorney for Petitioners
Jose Luis Magallon and
Gerardo Delgado-Garibay

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOSE LUIS MAGALLON, *Defendant-Appellant.*	No. 95-10438 D.C. No. CR-94-05011-07-OWW
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROBERT GONZALES *Defendant-Appellant.*	No. 95-10446 D.C. No. CR-94-05011-04-OWW
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LUIS E. ESTRADA-HERNANDEZ, *Defendant-Appellant.*	No. 95-10447 D.C. No. CR-94-05011-06-OWW

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GERARADO DELGADO-GARIBAY, *Defendant-Appellant.*	No. 96-10007 D.C. No. CR-94-05011-05-OWW OPINION

Appeals from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted
February 10, 1997 – San Francisco, California

Filed May 5, 1997

Before: Procter Hug, Jr., Chief Judge; David R. Thompson and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Thompson

COUNSEL

Joseph F. Walsh, Los Angeles, California, Joseph Wiseman, Petaluma, California, James R. Homola, Fresno, California, Carolyn Phillips, Milrod & Phillips, Fresno, California, for the defendants-appellants.

Kathleen A. Servatius, Assistant United States Attorney, Fresno, California, for the plaintiff-appellee.

OPINION

THOMPSON, Circuit Judge:

This case presents a question of first impression in this circuit: does the district court commit plain error in sentencing a defendant for a drug crime involving methamphetamine when the district court sentences the defendant under the Sentencing Guideline formula for D-methamphetamine rather than L-methamphetamine and the government has presented no evidence as to which type of methamphetamine was involved? Our answer is that the court commits plain error in this circumstance, the error affects the defendant's substantial rights, and the failure to correct the error would seriously affect the fairness and integrity of judicial proceedings. We therefore vacate the defendants' sentences and remand their cases to the district court for resentencing.[1]

I

Jose Louis [sic] Magallon, Robert Gonzales, Luis E. Estrada-Hernandez, and Gerardo Delgado-Garibay (collectively "defendants") were each convicted after a jury trial of conspiring to manufacture and distribute methamphetamine and/or manufacturing or aiding and abetting in the manufacture of "methamphetamine" in violation of 21 U.S.C. §§ 846 and 841(a)(1) and 18 U.S.C. § 2.

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[1] In a memorandum disposition filed concurrently with this opinion, we have affirmed the defendants' convictions and the district court's rulings on the other sentencing issues raised in the defendants' appeals.

The drug methamphetamine exists in two isomeric forms. *United States v. Dudden*, 65 F.3d 1461, 1470 (9th Cir. 1995). L-methamphetamine produces little or no effect when ingested, whereas D-methamphetamine produces an intense high. *United States v. McMullen*, 98 F.3d 1155, 1156 (9th Cir. 1996). At the time the defendants were sentenced, the Sentencing Guidelines (through the Drug Equivalency Tables) imposed substantially lower sentences for crimes involving L-methamphetamine than crimes involving D-methamphetamine. *See United States v. Bogusz*, 43 F.3d 82, 89 (3d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1812, (1995); USSG § 2D1.1, comment (n.10) (Drug Equivalency Tables) (Nov. 1990).[2]

At the time of sentencing in the present case, the government had in its possession small traces of methamphetamine obtained from objects seized from some of the conspirators. It did not, however, present any evidence at trial or during sentencing that the drug involved in the conspiracy was D-rather than L-methamphetamine.

The probation officer who prepared the defendants' presentence reports referred to the drug simply as "methamphetamine," but assumed it was D-methamphetamine in calculating the recommended base offense levels under the Guidelines. None of the defendants objected at sentencing to the base offense levels recommended in the

---

[2] The guidelines have since been amended to eliminate any distinction in sentencing between L- and D-methamphetamine. *See* USSG App. C (Amendment 517) (Nov. 1995). Here, however, we apply the Guideline provisions in effect at the time the defendants were sentenced. *See United States v. Sweeten*, 933 F.2d 765, 772 (9th Cir. 1991).

presentence reports or to the government's failure to produce any evidence that the drug involved was D-methamphetamine. The district court made no finding as to the type of methamphetamine involved, but used the base offense levels recommended in the presentence reports in calculating the defendants' sentences.[3]

On appeal, the defendants argue that the district court plainly erred in sentencing them for a crime involving D-methamphetamine when the government introduced no evidence as to the type of methamphetamine involved. They urge us to vacate their sentences and remand for resentencing using the formula for L-methamphetamine. Resentencing the defendants on the basis of L- rather than D-methamphetamine would substantially lower their sentence ranges under the Guidelines.

II

The Eighth and Tenth Circuits have held that a district court does not commit plain error in the circumstances of this case. *See United States v. Griggs*, 71 F.3d 276, 282 (8th Cir. 1995); *United States v. Deninno*, 29 F.3d 572, 580 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1117 (1995). The court in *Deninno* stated that "factual disputes [related to sentencing] do not rise to the level of plain error." *Id.* at 580.

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[3] We cannot infer from the district court's silence that it impliedly found the methamphetamine to be D-methamphetamine, based upon its computation of the defendants' offense levels as if the methamphetamine were D-methamphetamine. There was no evidence to support such a finding.

The Third and Eleventh Circuits, on the other hand, have held it *is* plain error to sentence defendants for a drug crime involving D-methamphetamine when the government fails to introduce any evidence as to the type of methamphetamine involved. *See United States v. Ramsdale*, 61 F.3d 825, 832 (11th Cir. 1995); *United States v. Bogusz*, 43 F.3d 82, 90 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1812 (1995). The Third Circuit explained: "[C]onsidering the magnitude of the difference in sentencing that could result from the application of the wrong organic isomer, we think the sentencing court's failure to make this determination would result in a grave miscarriage of justice." *See Bogusz*, 43 F.3d at 90. The Eleventh Circuit reasoned "[t]he government and the district court should have known that findings as to the type of methamphetamine were required. The failure to make such findings had a profound impact on the range of possible sentences imposed." *Ramsdale*, 61 F.3d at 832. In both *Ramsdale* and *Bogusz*, the courts of appeals vacated the defendants' sentences and remanded for resentencing to allow the government to meet its burden. *Id.; Bogusz*, 43 F.3d at 91.

Plain error, of course, is the crucial inquiry. Here, the defendants failed to object to the district court's application of the sentencing formula for D-methamphetamine. Because the defendants failed to object, we may reverse the district court only if it erred, the error was "plain," and it affected the defendants' substantial rights. *United States v. Olano*, 507 U.S. 725, 731-36. Where error is plain, we have discretion to correct it or let it stand. *Id.* at 735-36; Fed. R. Crim. P. 52(b). Nevertheless, we should "correct a plain forfeited error affecting substantial rights

if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Id.* at 736.

The government bears the burden at sentencing of proving by a preponderance of the evidence the type of methamphetamine involved in a drug offense. *Dudden*, 65 F.3d at 1470; *United States v. Harrison-Philpot*, 978 F.2d 1520, 1522-23 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2392 (1993). In *Dudden*, the defendant objected to the district court sentencing him under the guidelines for D-methamphetamine. He challenged the sufficiency of the government's evidence. The district court found the methamphetamine was D-methamphetamine and based its sentence on that finding. On appeal, we reversed. We held the district court had clearly erred in finding the methamphetamine was D-methamphetamine when the only evidence produced by the government consisted of two affidavits from DEA agents stating generally that clandestine methamphetamine labs almost always manufacture D-methamphetamine and that they had never personally found pure L-methamphetamine in any such lab. *Dudden*, 65 F.3d at 1471-72.

Dudden was decided before the district court sentenced any of the defendants here. Given our holding in *Dudden*, the district court erred when it computed the defendants' sentences using D-methamphetamine. The error was also "plain." Whereas in *Dudden* there was at least some evidence, though insufficient, that the drug involved was D-methamphetamine, here there was no evidence at all.

The government argues the defendants have not established their rights were substantially affected

because they have not shown they were prejudiced by the error. We disagree. The defendants were sentenced as if the methamphetamine were D-methamphetamine without any proof that it was. In this sense the prejudice is obvious. But it is not in this sense that the government couches its prejudice argument. The government contends that because the defendants went along with the court's sentencing without any objections, they indicated their satisfaction with this aspect of the sentencing process and were not prejudiced as a result. The essence of this argument is that the defendants did not simply forfeit the district court's error by not objecting, they waived the error.

Under *Olano*, "forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' " *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1930)). "Mere forfeiture, as opposed to waiver, does not extinguish an 'error.' " *Id.*

In the circumstances of this case, we cannot conclude the defendants intentionally relinquished or abandoned their right not to be sentenced for D-methamphetamine without proof that was the drug involved. It is true the defendants might have been alerted to the likelihood the district court would compute their sentences on the basis of D-methamphetamine, because that is what the probation officer did in the presentence reports. The presentence reports made no mention of the type of methamphetamine involved, but the recommended base offense levels could only have been calculated using D-methamphetamine.

Even if the defendants should have been alerted by the presentence reports to how the district court might compute their sentences, they retained the right to be sentenced for D-methamphetamine only if there was evidence to support a finding that D-methamphetamine was the type of methamphetamine involved. The defendants did not intentionally waive or abandon that right. Instead, when the district court sentenced them under the guideline applicable to D-methamphetamine without any evidence to support such sentencing, and the defendants failed to object, they forfeited the district court's error.[4]

The error affected the defendants' substantial rights. As the Eleventh Circuit stated, the error "had a profound impact on the range of possible sentences imposed." *See Ramsdale*, 61 F.3d at 831. Because it would seriously affect the fairness and integrity of judicial proceedings to allow the error to stand, we vacate the district court's sentence and remand these cases for resentencing.

Although in *Dudden* we remanded with instructions to the district court to resentence the defendants on the basis of L-methamphetamine rather than D-methamphetamine, we impose no such restriction here. The sentencing posture in this case is different from *Dudden*.

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[4] The government's reliance on *United States v. McMullen*, 98 F.3d 1155 (9th Cir. 1996), for the proposition that if a defendant fails to raise the issue of methamphetamine type in the district court, he is barred from raising the issue on appeal, is misplaced. *McMullen* barred the defendant from raising the issue on collateral review; the present case involves direct appeal.

In *Dudden*, both sides presented evidence at the sentencing hearing on the type of methamphetamine involved. *Dudden*, 65 F.3d at 1471. The court considered that evidence and made its finding. *Id.* Here, by contrast, the type of methamphetamine involved has never been litigated. The sentencing hearing simply proceeded on the assumption that the drug involved was D-methamphetamine. In this circumstance, the appropriate remedy is to vacate the defendants' sentences and remand for a sentencing hearing at which the government will bear the burden to establish by a preponderance of the evidence the type of methamphetamine involved. *See Ramsdale*, 61 F.3d at 830-32; *Bogusz*, 43 F.3d at 91.

Sentences VACATED; REMANDED for resentencing.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOSE LUIS MAGALLON, *Defendant-Appellant.*	No. 95-10438 D.C. No. CR-94-05011-07-OWW
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROBERT GONZALES, *Defendant-Appellant.*	No. 95-10446 D.C. No. CR-94-05011-04-OWW
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LUIS E. ESTRADA-HERNANDEZ, *Defendant-Appellant.*	No. 95-10447 D.C. No. CR-94-05011-06-OWW

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GERARADO DELGADO-GARIBAY, *Defendant-Appellant.*	No. 96-10007 D.C. No. CR-94-05011-05-OWW ORDER

Filed June 5, 1997

Before: Procter Hug, Jr., Chief Judge; David R. Thompson and Andrew J. Kleinfeld, Circuit Judges.

ORDER

The opinion filed May 5, 1997 is withdrawn. Submission of this case is withdrawn and is deferred pending the filing of an opinion in the case of *United States v. Scrivner,* No. 95-30027 now pending before another panel of this court.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE LUIS MAGALLON, Defendant-Appellant.	Nos. 95-10438 D.C. No. CR-94-05011-07-OWW
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT GONZALES, Defendant-Appellant.	No. 95-10446 D.C. No. 94-05011-04-OWW
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS E. ESTRADA-HERNANDEZ, Defendant-Appellant.	No. 95-10447 D.C. No. CR-94-05011-06-OWW

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GERARDO DELGADO-GARIBAY, Defendant-Appellant.	Nos. 96-10007 D.C. No. CR-94-05011-05-OWW MEMORANDUM* (Filed Sep. 15, 1997)

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted February 10, 1997
San Francisco, California

Before: HUG, Chief Judge; THOMPSON and KLEINFELD, Circuit Judges.

On May 5, 1997, we filed a memorandum disposition affirming the defendants' convictions. We also affirmed the district court's ruling on all but one of the sentencing issues raised by the defendants in this appeal. On that one sentencing issue, we filed an opinion May 5, 1997 vacating the defendants' sentences. That opinion, however, was vacated by our order filed June 5, 1997. We vacated the opinion because another panel of this court had the same sentencing issue before it in *United States v. Scrivner,* No. 95-30227, and had had that case under submission since September 16, 1996.

The *Scrivner* opinion was filed June 10, 1997. *United States v. Scrivner,* 114 F.3d 964 (9th Cir.1997). That opinion

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

is dispositive of the one sentencing issue which was the subject of our earlier (now withdrawn) opinion. We now file this memorandum dispositioned and, consistent with *Scrivner* we affirm the defendants' sentences.

With regard to the issue which was the subject of our earlier opinion, the defendants argue the district court committed plain error in sentencing them for a crime involving D-methamphetamine when the government introduced no evidence as to the type of methamphetamine involved. The defendants urge us to vacate their sentences and remand for resentencing using the formula for L-methamphetamine.

In *Scrivner*, the court held, on facts the same as the facts in this case pertaining to the defendants' sentences, that when there is no evidence in the record as to the type of methamphetamine involved, and the presentence report computes the defendants' sentences and the district court sentences the defendants on the basis of D-methamphetamine, if the defendants fail to object to the type of methamphetamine used to compute their sentences, the court commits no error in failing *sua sponte* to hold a hearing to determine the type of methamphetamine involved. *Id.* at 969-70.

In the present case there was no evidence before the trial or sentencing court as to the type of methamphetamine involved in the defendants' drug crime. The presentence report computed the defendants' sentences, and the district court sentenced them, on the basis that the type of methamphetamine was D-methamphetamine. No objection was made by any of the defendants. *Scrivner* controls this case. The district court

did not commit plain error in sentencing the defendants on the basis that the methamphetamine involved was D-methamphetamine.

AFFIRMED.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE LUIS MAGALLON, Defendant-Appellant.	Nos. 95-10438 D.C. No. CR-94-05011-07-OWW
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT GONZALES, Defendant-Appellant.	Nos. 95-10446 D.C. No. CR-94-05011-04-OWW
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS E. ESTRADA-HERNANDEZ, Defendant-Appellant.	Nos. 95-10447 D.C. No. CR-94-05011-06-OWW
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GERARDO DELGADO-GARIBAY, Defendant-Appellant.	Nos. 96-10007 D.C. No. CR-94-05011-05-OWW ORDER (Filed Oct. 31, 1997)

Before: HUG, Chief Judge; THOMPSON and KLEINFELD, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CR-F-94-5011-003-OWW

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSE LUIS MAGALLON

Defendant.

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

The Defendant was found guilty on Count One after a plea of not guilty. Accordingly, the Defendant is adjudged guilty of such count, which involves the following offense: 21:846 and 841(a)(1) Conspiracy to Manufacture and Distribute Methamphetamine. The Defendant is hereby committed to the custody of the Bureau of Prisons of the United States to be imprisoned for a term of 235 months.

. . . .

Guideline Range Determined by the Court:

Total Offense Level: 38
Criminal History: I
Imprisonment Range: 235 to 293 months

October 10, 1995
Date of Imposition of Sentence

OLIVER W. WANGER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CR-F-94-5011-001-OWW

UNITED STATES OF AMERICA

Plaintiff,

v.

GERARDO DELGADO-GARIBAY

Defendant.

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

The Defendant was found guilty on Count One and Count Two after a plea of not guilty. Accordingly, the Defendant is adjudged guilty of each count, which involves the following offenses: 21:846 and 841(a)(1) Conspiracy to Manufacture and Distribute Methamphetamine and 21:841(a)(1) and 18:2 Manufacture of Methamphetamine, Aiding and Abetting. The Defendant is hereby committed to the custody of the Bureau of Prisons of the United States to be imprisoned for a term of life.

Guideline Range Determined by the Court:

. . . .

Total Offense Level: 42
Criminal History: I
Imprisonment Range: 360 to life

December 13, 1995
Date of Imposition of Sentence

OLIVER W. WANGER
United States District Judge